

## Small Business Administration

## § 121.104

(1) Parties to a joint venture are affiliates if any one of them seeks SBA financial assistance for use in connection with the joint venture.

(2) Except as provided in paragraph (h)(3) of this section, concerns submitting offers on a particular procurement or property sale as joint venturers are affiliated with each other with regard to the performance of that contract.

(3) *Exception to affiliation for certain joint ventures.* (i) A joint venture of two or more business concerns may submit an offer as a small business for a Federal procurement without regard to affiliation under paragraph (h) of this section so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract, provided:

(A) The procurement qualifies as a “bundled” requirement, at any dollar value, within the meaning of § 125.2(d)(1)(i) of this chapter; or

(B) The procurement is other than a “bundled” requirement within the meaning of § 125.2(d)(1)(i) of this chapter, and:

(1) For a procurement having a receipts based size standard, the dollar value of the procurement, including options, exceeds half the size standard corresponding to the NAICS code assigned to the contract; or

(2) For a procurement having an employee-based size standard, the dollar value of the procurement, including options, exceeds \$10 million.

(ii) A joint venture of at least one 8(a) Participant and one or more other business concerns may submit an offer for a competitive 8(a) procurement without regard to affiliation under paragraph (h) of this section so long as the requirements of § 124.513(b)(1) of this chapter are met.

(iii) Two firms approved by SBA to be a mentor and protégé under 13 CFR 124.520 may joint venture as a small business for any Federal Government procurement, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement and, for purposes of 8(a) sole source requirements, has not reached the dollar limit set forth in 13 CFR 124.519.

(4) A contractor and its ostensible subcontractor are treated as joint ven-

turers, and therefore affiliates, for size determination purposes. An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract, or of an order under a multiple award schedule contract, or a subcontractor upon which the prime contractor is unusually reliant. All aspects of the relationship between the prime and subcontractor are considered, including, but not limited to, the terms of the proposal (such as contract management, technical responsibilities, and the percentage of subcontracted work), agreements between the prime and subcontractor (such as bonding assistance or the teaming agreement), and whether the subcontractor is the incumbent contractor and is ineligible to submit a proposal because it exceeds the applicable size standard for that solicitation.

(5) For size purposes, a concern must include in its receipts its proportionate share of joint venture receipts, and in its total number of employees its proportionate share of joint venture employees.

(i) *Affiliation based on franchise and license agreements.* The restraints imposed on a franchisee or licensee by its franchise or license agreement relating to standardized quality, advertising, accounting format and other similar provisions, generally will not be considered in determining whether the franchisor or licensor is affiliated with the franchisee or licensee provided the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Affiliation may arise, however, through other means, such as common ownership, common management or excessive restrictions upon the sale of the franchise interest.

[61 FR 3286, Jan. 31, 1996, as amended at 62 FR 26381, May 14, 1997; 63 FR 35738, June 30, 1998; 64 FR 57370, Oct. 25, 1999; 65 FR 30840, May 15, 2000; 65 FR 35812, June 6, 2000; 65 FR 45833, July 26, 2000; 69 FR 29201, May 21, 2004; 70 FR 51248, Aug. 30, 2005]

### § 121.104 How does SBA calculate annual receipts?

(a) *Receipts* means “total income” (or in the case of a sole proprietorship, “gross income”) plus “cost of goods sold”

as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; Form 1040, Schedule F for farms; Form 1040, Schedule C for other sole proprietorships). Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees; proceeds from transactions between a concern and its domestic or foreign affiliates; and amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker. For size determination purposes, the only exclusions from receipts are those specifically provided for in this paragraph. All other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, and employee-based costs such as payroll taxes, may not be excluded from receipts.

(1) The Federal income tax return and any amendments filed with the IRS on or before the date of self-certification must be used to determine the size status of a concern. SBA will not use tax returns or amendments filed with the IRS after the initiation of a size determination.

(2) When a concern has not filed a Federal income tax return with the IRS for a fiscal year which must be included in the period of measurement, SBA will calculate the concern's annual receipts for that year using any other available information, such as the concern's regular books of account, audited financial statements, or information contained in an affidavit by a person with personal knowledge of the facts.

(b) *Completed fiscal year* means a taxable year including any short year. "Taxable year" and "short year" have the meanings attributed to them by the IRS.

(c) *Period of measurement.* (1) Annual receipts of a concern that has been in

business for three or more completed fiscal years means the total receipts of the concern over its most recently completed three fiscal years divided by three.

(2) Annual receipts of a concern which has been in business for less than three complete fiscal years means the total receipts for the period the concern has been in business divided by the number of weeks in business, multiplied by 52.

(3) Where a concern has been in business three or more complete fiscal years but has a short year as one of the years within its period of measurement, annual receipts means the total receipts for the short year and the two full fiscal years divided by the total number of weeks in the short year and the two full fiscal years, multiplied by 52.

(d) *Annual receipts of affiliates.* (1) The average annual receipts size of a business concern with affiliates is calculated by adding the average annual receipts of the business concern with the average annual receipts of each affiliate.

(2) If a concern has acquired an affiliate or been acquired as an affiliate during the applicable period of measurement or before the date on which it self-certified as small, the annual receipts used in determining size status includes the receipts of the acquired or acquiring concern. Furthermore, this aggregation applies for the entire period of measurement, not just the period after the affiliation arose.

(3) If the business concern or an affiliate has been in business for a period of less than three years, the receipts for the fiscal year with less than a 12 month period are annualized in accordance with paragraph (c)(2) of this section. Receipts are determined for the concern and its affiliates in accordance with paragraph (c) of this section even though this may result in using a different period of measurement to calculate an affiliate's annual receipts.

(4) The annual receipts of a former affiliate are not included if affiliation ceased before the date used for determining size. This exclusion of annual receipts of a former affiliate applies

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during the entire period of measurement, rather than only for the period after which affiliation ceased.

(e) Unless otherwise defined in this section, all terms shall have the meaning attributed to them by the IRS.

[61 FR 3286, Jan. 31, 1996, as amended at 65 FR 48604, Aug. 9, 2000; 69 FR 29203, May 21, 2004]

### § 121.105 How does SBA define “business concern or concern”?

(a)(1) Except for small agricultural cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.

(2) A small agricultural cooperative is an association (corporate or otherwise) acting pursuant to the provisions of the Agricultural Marketing Act (12 U.S.C.A. 1141j) whose size does not exceed the size standard established by SBA for other similar agricultural small business concerns. A small agricultural cooperative's member shareholders are not considered to be affiliates of the cooperative by virtue of their membership in the cooperative. However, a business concern or cooperative that does not qualify as small under this part may not be a member of a small agricultural cooperative.

(b) A business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative, except that where the form is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture.

(c) A firm will not be treated as a separate business concern if a substantial portion of its assets and/or liabilities are the same as those of a predecessor entity. In such a case, the annual receipts and employees of the predecessor will be taken into account in determining size.

[61 FR 3286, Jan. 31, 1996, as amended at 70 FR 51248, Aug. 30, 2005]

### § 121.106 How does SBA calculate number of employees?

(a) In determining a concern's number of employees, SBA counts all individuals employed on a full-time, part-time, or other basis. This includes employees obtained from a temporary employee agency, professional employee organization or leasing concern. SBA will consider the totality of the circumstances, including criteria used by the IRS for Federal income tax purposes, in determining whether individuals are employees of a concern. Volunteers (*i.e.*, individuals who receive no compensation, including no in-kind compensation, for work performed) are not considered employees.

(b) Where the size standard is number of employees, the method for determining a concern's size includes the following principles:

(1) The average number of employees of the concern is used (including the employees of its domestic and foreign affiliates) based upon numbers of employees for each of the pay periods for the preceding completed 12 calendar months.

(2) Part-time and temporary employees are counted the same as full-time employees.

(3) If a concern has not been in business for 12 months, the average number of employees is used for each of the pay periods during which it has been in business.

(4)(i) The average number of employees of a business concern with affiliates is calculated by adding the average number of employees of the business concern with the average number of employees of each affiliate. If a concern has acquired an affiliate or been acquired as an affiliate during the applicable period of measurement or before the date on which it self-certified as small, the employees counted in determining size status include the employees of the acquired or acquiring concern. Furthermore, this aggregation applies for the entire period of measurement, not just the period after the affiliation arose.

(ii) The employees of a former affiliate are not counted if affiliation ceased before the date used for determining size. This exclusion of employees of a former affiliate applies during